UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DANIEL SPLUDE, et al.,	***)***	
	)	
Plaintiffs	***)***	
	)	
v.	***)***	***Civil No. 97-95-P-C***
	)	
KENNETH S. APFEL,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This case concerns a problem unique to certain so-called "concurrent claimants" — that is, those who seek benefits under both of the Social Security Administration's two disability benefits programs: Social Security Disability ("SSD"), which is an insurance program, and Supplemental Security Income ("SSI"), eligibility for which turns on income guidelines. The so-called "windfall-offset" provisions of the Social Security Act are designed to prevent concurrent claimants from receiving both types of benefits for the same period of disability. When calculating and paying

[1] The case is presented as a request for judicial review by this court pursuant to Local Rule 26, which requires the plaintiffs to file an itemized statement of the specific errors upon which they seek reversal of the Commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on November 7, 1997 pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

Although there is no reference to any constitutional issues in the plaintiffs' statement of errors, the plaintiffs addressed such issues at oral argument and the Commissioner, without objecting to these issues as waived, discussed them as well. In the circumstances, it is appropriate to take up the constitutional questions. However, subsequent to oral argument, I determined that the constitutional claims were insufficiently developed to permit a reasoned decision. I therefore ordered supplemental briefing on the constitutional issues. *See* Procedural Order (Docket No. 5).

disability benefits due retroactively under the SSI program, the Social Security Administration is authorized in appropriate circumstances to reimburse a state agency for interim assistance the state agency has paid to the claimant pending the ultimate SSI determination. In this case, because the Social Security Administration processed the plaintiffs' SSI claims before their requests for SSD benefits, the state of Maine was reimbursed for SSI benefits advanced to them and their SSD benefits were reduced accordingly. Had the claims been processed in the reverse order, the plaintiffs would have received the full amount of their SSD benefits and the reimbursement to the state out of their SSI awards would have been significantly lower by operation of the windfall-offset provisions. The plaintiffs challenge this result on both statutory and constitutional grounds. I conclude that the Social Security Act permits the plaintiffs' claims to have been treated in such a manner but that the policy violates the constitutional guarantee of equal protection. However, because I also conclude that the plaintiffs are not entitled to the requested remedy of additional benefits, I recommend that the decision of the Commissioner be affirmed.

I. Background

Both plaintiffs have been determined to be disabled within the meaning of the Act, and therefore entitled to both SSI and SSD benefits. Record pp. 21, 24. The disability determinations themselves are not at issue.

On or about December 4, 1992 plaintiff Daniel Splude signed an "Initial Payment Agreement" authorizing the U.S. Department of Health and Human Services (and thus the Social Security Administration)[2] to send his initial SSI payment to the Maine Department of Human

[2] Prior to becoming an independent executive branch agency in 1995, the Social Security (continued...)

Services. *Id.* at 131. The agreement, in turn, authorized the state agency to deduct from this sum "an amount equal to the sum of all public assistance benefits (not including assistance payments financed wholly or partly with Federal funds) made, to or on behalf of" Splude, remitting the balance to him. *Id*. Plaintiff Ronald Cargill signed an identical agreement on April 1, 1993. *Id.* at 376.

In April 1993 an Administrative Law Judge determined that Splude was disabled and therefore entitled to concurrent benefits. *Id*. at 124-25. On May 25, 1993 the Social Security Administration notified Splude that he would begin receiving SSI payments, but that his first check, amounting to $8,883.30 in retroactive benefits, was being sent to the state agency pursuant to the Interim Payment Agreement. *Id.* at 162. Less than a month later, on June 15, 1993, the Social Security Administration advised Splude that he was also entitled to SSD benefits in the amount of $344 per month, and retroactive benefits in the amount of $307.40. *Id.* at 174. Although the June 15, 1993 letter does not make this clear, Splude's retroactive SSD benefits were reduced pursuant to the windfall-offset provision of the Act, 42 U.S.C. 1320a-6, which has the effect of preventing a claimant from receiving both SSI and SSD benefits for the same period. *See* Record pp. 142-43.

Cargill's application for SSI and SSD benefits proceeded along the same lines. Following a favorable disability determination by an administrative law judge, Cargill was advised on July 26, 1993 of his entitlement to SSI benefits in the amount of $444 per month, including $4,764.40 in retroactive benefits that were being reimbursed to the state agency. *Id.* at 22, 390. On August 16, 1993 Cargill received notice of his award of SSD benefits, indicating that the windfall-offset

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[2](...continued)
Administration was part of the Department of Health and Human Services.

provisions would apply as they did in the case of Splude. *Id.* at 397.[3]

Both plaintiffs requested reconsideration, *id* at 138-41, 395-97, were denied, *id.* at 142, 400, and exercised their right to a hearing on the matter before an administrative law judge, *id.* at 147-50, 403-05. The cases were consolidated at the hearing level at the request of the plaintiffs. *Id*. at 25. Following a pre-hearing conference and a hearing, at both of which the plaintiffs were not present but represented by counsel, and the receipt of interrogatory responses from the office of the Social Security Administration's Deputy Commissioner for Programs, Administrative Law Judge Peter B. Storey issued an exhaustive Recommended Decision.[4] *Id*. at 21-75. Judge Storey determined that, because the agency processed their SSI awards before their awards of benefits under the SSD program, thus triggering both the Initial Payment Agreements and the windfall-offset provisions, an "indirect transfer of a specific, identifiable amount" of each plaintiff's SSD benefits[5] had been effectuated in violation of section 207 of the Social Security Act, 42 U.S.C. § 407, which provides that SSD benefits may not be assigned, transferred or subject to attachment via any form of legal process.[6] Finding 27, Record p. 73. The Appeals Council rejected Judge Storey's recommendation,

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[3] The August 16, 1993 award letter is not of record, and its existence is inferred from Cargill's request for reconsideration of it. The facts relating to the August 16, 1993 determination are not in dispute.

[4] Although the usual practice is for the Administrative Law Judge simply to issue a decision, "he or she may send the case to the Appeals Council with a recommended decision where appropriate." 20 C.F.R. §§ 404.953(b), 416.1453(c).

[5] Relying on figures supplied to him in response to his interrogatories, Judge Story determined that, had the plaintiffs' retroactive SSD claims been processed first, only $1,883.30 would have been reimbursed to the state on behalf of Splude and $2,211.40 on behalf of Cargill. Record p. 41.

[6] The plaintiffs also sought to raise constitutional issues before the Administrative Law (continued...)

determined that the benefits determinations at issue were consistent with the Act, and concluded it was without jurisdiction to consider the plaintiffs' constitutional issues. *Id*. at 9-12, 360-63. The Appeals Council's decisions represent the final determination of the matter as to each plaintiff. 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs*., 869 F.2d 622, 623 (1st Cir. 1989). The plaintiffs jointly seek review in this court pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3).

II. Statutory Construction

Section 207 of the Social Security Act, 42 U.S.C. § 407, is a broadly worded provision designed to protect Social Security claimants from what might otherwise be lawful efforts to divest them of SSD benefits to which they are entitled under Subchapter 2 of the Act. The provision reads:

> (a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.
>
> (b) No other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.

42 U.S. C. § 407. The plaintiffs contend that, notwithstanding authority relied upon by the Social Security Administration elsewhere in the Act, section 207 precludes the offset of their retroactive SSD benefits in the amount of their retroactive SSI benefits that were first paid out by, and then reimbursed to, the state.

The prohibition against the transfer or assignment of SSD benefits has been a part of the

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[6](...continued)
Judge, but he declined to reach them. Record p. 33.

Social Security Act since 1935. *See Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 415 n.3 (1973) (setting out original text of section); H.R. Rep. No. 98-25 at 82-83 (1983), *reprinted in* 1983 U.S.C.C.A.N. 219, 301-02 (describing history of section 207). As the legislative history makes clear, Congress added subsection (b) in 1983 because some courts, interpreting certain provisions of the Bankruptcy Reform Act of 1978, had ordered the Social Security Administration to remit debtors' SSD benefits to trustees in bankruptcy. *Id*. at 302.

Section 1631 of the Social Security Act, which governs the SSI program, explicitly extends the prohibition set forth in section 207 to SSI benefits. 42 U.S.C. § 1383(d)(1).[7] The statutory authority for reimbursing states for interim assistance provided to SSI claimants is also part of section 1631. This provision, codified as 42 U.S.C. § 1383(g), provides in relevant part:

> **(g) Reimbursement to States for interim assistance payments**
>
> (1) Notwithstanding subsection (d)(1) of this section . . . , the Commissioner of Social Security may, upon written authorization by an individual, withhold benefits due with respect to that individual and may pay to a State (or a political subdivision thereof if agreed to by the Commissioner of Social Security and the State) from the benefits withheld an amount sufficient to reimburse the State (or political subdivision) for interim assistance furnished on behalf of the individual by the State (or political subdivision).
>
> (2) For purposes of this subsection, the term "benefits" with respect to any individual means supplemental security income benefits under this subchapter, . . . that the Commissioner of Social Security has determined to be due with respect to the individual at the time the Commissioner of Social Security makes the first

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[7] Section 1631(d)(1) provides in relevant part:

> The provisions of section 407 of this title [i.e., section 207 of the Social Security Act] . . . shall apply with respect to this part [i.e., the procedural and general provisions governing SSI as set out in section 1631] to the same extent as they apply in the case of subchapter II of this chapter [governing SSD benefits].

42 U.S.C. § 1383(d)(1).

> payment of benefits with respect to the period described in clause (A) or (B) of paragraph (3). . . .
>
> (3) For purposes of this subsection, the term "interim assistance" with respect to any individual means assistance financed from State or local funds and furnished for meeting basic needs (A) during the period, beginning with the month following the month in which the individual filed an application for benefits (as defined in paragraph (2)), for which he was eligible for such benefits, or (B) during the period beginning with the first month for which the individual's benefits (as defined in paragraph (2)) have been terminated or suspended if the individual was subsequently found to have been eligible for such benefits.

42 U.S.C. § 1383(g). This provision is certainly complicated, but the operative phrase for present purposes is the first four words — "[n]otwithstanding subsection (d)(1) of this section" — which make clear that the reimbursement to states of interim assistance payments is an exception to the non-assignment provision governing SSI benefits.

Rounding out the list of applicable provisions of the Social Security Act is section 1127, 42 U.S.C.. § 1320a-6, the somewhat prolix provision governing windfall-offsets:

> **(a) Reduction in Benefits**
>
> Notwithstanding any other provision of this chapter, in any case where an individual —
>
> > (1) is entitled to benefits under subchapter II of this chapter [i.e., SSD] that were not paid in the months in which they were regularly due; and
> >
> > (2) is an individual or eligible spouse eligible for supplemental security income benefits for one or more months in which the benefits referred to in clause (1) were regularly due,
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> then any benefits under subchapter II of this chapter that were regularly due in such month or months, or supplemental security income benefits for such month or months, which are due but have not been paid to such individual or eligible spouse shall be reduced by an amount equal to so much of the supplemental security income benefits, whether or not paid retroactively, as would not have been paid or would not be paid with respect to such individual or spouse if he had received such benefits

> under subchapter II of this chapter in the month or months in which they were regularly due. . . .

42 U.S.C. § 1320a-6. The original windfall-offset provision — dating from 1980 — required only an adjustment to retroactive SSD benefits to account for already-paid retroactive SSI benefits. P.L. 96-265 § 501, 94 Stat. 469-70 (1980). A 1984 amendment addressed the other windfall possibility, authorizing an offset when a retroactive SSD award is made prior to the award of retroactive SSI benefits. P.L. 98-369 § 2615(a), 98 Stat. 1132-33; *see also* H. Conf. Rep. No. 98-861 at 1391, *reprinted in* 1984 U.S.C.C.A.N. 1445, 2079 (describing purpose of 1984 amendment).[8]

The plaintiffs contend that the Commissioner has violated the anti-assignment language in section 207 by reimbursing the state out of their retroactive SSI awards and then reducing their retroactive SSD payments to reflect the full SSI awards, including the portion returned to the state agency. I discern no assignment that runs afoul of section 207, and conclude that the decisions of the Commissioner are fully consistent with the Act.

When the "plain meaning" of a statute is "clear on its face, the sole function of the courts is to enforce it according to its terms." *United States v. Rivera*, 131 F.3d 222, 224 (1st Cir. 1997) (en banc) (citations and internal quotation marks omitted). By its terms, section 207 protects only two things: (1) the right to future payment of SSD benefits, which is deemed to be non-transferable and non-assignable, and (2) "moneys paid or payable or rights existing under" the SSD provisions of the

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[8] Even though this situation was thus not explicitly addressed in section 1127 until the 1984 amendment, the legislative history of the original windfall provision makes clear that Congress always intended windfall-offset to apply to those seeking retroactive SSD and SSI benefits regardless of which concurrent claim was processed first. *See* S. Rep. No. 96-408 at 78, reprinted in U.S.C.C.A.N. 1277, 1356 (1980) ("an individual's entitlement under the two titles shall be considered a totality so that payment under either program shall be deemed to be a payment under the other if that is subsequently found to be appropriate.").

Act. Since this case deals with retroactive benefits, only the latter protection is at issue. The windfall-offset language in section 1127(a) had the effect of altering the amount of money payable to the plaintiffs under the SSD program. Thus, when the Social Security Administration offset their retroactive SSD awards to reflect SSI benefits already paid (some of which had been advanced by, and reimbursed to, the state) it simply determined the amount of retroactive SSD benefits that otherwise enjoy the statutory protection from assignment.

This construction of section 207 is consistent with the Supreme Court's interpretation of the provision. *Philpott* concerned a New Jersey statute that required recipients of certain state welfare payments to reimburse the state for such benefits. *Philpott*, 409 U.S. at 414. Retroactively paid SSD benefits were "monies paid . . . under this subchapter" and thus not reachable by the state in a suit brought to enforce the state statute. *Id*. at 416. Similarly, in a case emphatically relied upon by the plaintiffs both at oral argument here and during the administrative proceedings, the Supreme Court determined that California's divorce law ran afoul of the anti-assignment protection by requiring a divorcing husband to pay a portion of his federal retirement benefits to his wife. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 583 (1979).[9] The theme of these cases is that a claimant's SSD benefits are protected from outside invasion, but not provisions of the Social Security Act that tend to limit the amount of SSD benefits to which they are entitled in the first instance.

Another established canon of statutory construction is that statutes must be "construed as a whole." *Acadia Ins. Co. v. McNeil*, 116 F.3d 599, 604 (1st Cir. 1997). Every other relevant

[9] *Hisquierdo* actually concerned the anti-assignment provision of the Railroad Retirement Act, which is substantially similar to section 207(a) of the Social Security Act. *See Hisquierdo*, 439 U.S. at 576 and 584 (citing *Philpott* for the proposition that anti-assignment provisions generally intended to "ensure[] that the benefits actually reach the beneficiary.").

provision of the Social Security Act supports the construction of section 207 adopted by the Commissioner. The provision authorizing the Social Security Administration to reimburse states for interim assistance paid to claimants, by deducting such sums from retroactive SSI benefits that would otherwise be payable, contains language that makes explicit the congressional determination that such reimbursement is *not* an assignment or transfer of Social Security benefits. *See* 42 U.S.C. § 1383(g)(1) ("Notwithstanding subsection (d)(1) of this section"); *see also* 42 U.S.C. § 1383(d)(1) (making section 207 of the Act applicable to SSI benefits "to the same extent as they apply" to SSD benefits). And the windfall-offset provision, as amended in 1984, can only be rationally construed as a policy determination by Congress that the net result in the case of concurrent claimants must be that the two disability programs supplement rather than overlap each other. This construction is supported by the language in the windfall-offset provision making its mechanism applicable "[n]otwithstanding any other provision of this chapter [i.e. the Social Security Act]," 42 U.S.C. § 1320a-6(a) — including the non-assignment provisions.[10]

As the Appeals Council pointed out, three circuit courts have considered and rejected arguments similar to those raised by the plaintiffs here. In *White v. Bowen*, 835 F.2d 974 (2d Cir. 1987), the Second Circuit held that section 207 mandates no particular order for processing concurrent SSD and SSI claims, and invoking the non-assignability provision to require calculation of SSD benefits first would bestow a windfall on claimants while threatening the source of reimbursement to state welfare agencies. *Id*. at 978-79. The Eighth Circuit has reached the same

[10] Thus, contrary to both the position of the plaintiffs asserted here and the extensive discussion of section 207 in the opinion of the administrative law judge, subsection (b) of section 207 — which requires an "express reference" to section 207 in any law that purports to limit rights secured by that section — is not implicated.

conclusion. *See McKenzie v. Bowen*, 787 F.2d 1216, 1222 (8th Cir. 1986). The Fifth Circuit has flatly concluded that, in view of the enactment of the current version of the windfall-offset provisions, section 207 "raises no bar" to treating "SSI and social security disability as integrated programs." *Lyon v. Bowen*, 802 F.2d 794, 800 (5th Cir. 1986); *but see Ellender v. Schweiker*, 575 F.Supp. 590, 599 (S.D.N.Y. 1983) ("cross-program" recovery precluded by plain language of section 207 as well as legislative history). After my own thorough inquiry into the applicable provisions of the Social Security Act and their legislative histories, I am more than satisfied that these authorities are consistent with the view the First Circuit would adopt. I agree with the Commissioner that the Social Security Act as presently drafted permits concurrent claims for retroactive SSD and SSI benefits to be resolved by calculating the SSI benefits first, by reimbursing the state for SSI benefits advanced through general assistance, and by reducing claimants' SSD benefits to reflect the sums so reimbursed.

III. Constitutional Issues

The court must next decide whether applying the Social Security Act to the plaintiffs in this manner, thus causing them to receive substantially less retroactive benefits than they would have received had their SSD claims been processed first, violates any rights secured to the plaintiffs by the Constitution. The plaintiffs advance two distinct constitutional arguments, one based on equal protection and the other on procedural due process. I take up the procedural due process issue first.

The plaintiffs' procedural due process argument is somewhat inscrutable and, indeed, is fully developed only in their reply memorandum. In support of their contention that their procedural due process rights have been violated, they rely principally on *Dionne v. Bouley*, 757 F.2d 1344 (1st Cir.

1985). At issue in *Dionne* was the constitutionality of Rhode Island's post-judgment garnishment procedure. *Id*. at 1345. The plaintiff had deposited Social Security benefits in a bank account that was attached pursuant to the challenged procedure, although these funds were subject to the exemption from garnishment created by section 207 of the Social Security Act. *Id*. at 1350. The First Circuit agreed with the trial court that the state garnishment procedure failed to provide the plaintiff with the requisite notice and opportunity to be heard concerning her right to protect her Social Security benefits in light of the protections afforded her by section 207. *Id*.

In connection with their discussion of *Dionne*, and presumably reacting to the colloquy among the court and parties at oral argument, the plaintiffs criticize the court's "insistence on artificially segregating the [section 207] statutory claim from the constitutional ones with which it is intertwined." Plaintiff Splude's Reply Memorandum of Law in Support of Plaintiffs (Docket No. 10) at 8. This insistence, according to the plaintiffs, allows the Commissioner to "trivialize" *Dionne*. *Id*. As the First Circuit has made clear, the property interest as to which the plaintiff in *Dionne* was entitled to due process protection existed precisely because section 207 protected her Social Security benefits from garnishment by the state. *Dionne*, 757 F.2d at 1350. Thus, to the extent that the assertion of due process rights here is premised on the existence of a property interest secured under section 207, the due process challenge fails because there is no property interest to be protected. The statutory and constitutional issues are indeed intertwined in that sense.

The plaintiffs further contend that the Commissioner has deprived them of their constitutional right to equal protection because they have been subjected to a classification scheme that does not relate rationally to a legitimate government objective. *See Baker v. City of Concord*, 916 F.2d 744,

747 (1st Cir. 1990) (citations omitted).[11] Thus they concede that the statute as applied to them in this case neither impairs a fundamental right nor operates against a suspect class. *See Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 660 (1st Cir. 1997) (noting that rational basis review appropriate in such circumstances). A statutory scheme survives rational basis review if it "bear[s] a rational relationship to an independent and legitimate legislative end." *Id*. (citation omitted).

Readily agreeing that rational-basis review applies, the Commissioner points out that the plaintiffs bear the burden of proving the lack of a rational relationship to a legitimate governmental interest. *See Eastern Enters*., 110 F.3d at 155-56 (economic legislation receives "most deferential level of judicial scrutiny" with burden on plaintiff to demonstrate irrationality); *see also Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (no basis for applying stricter standard when economic legislation involves public welfare assistance). The burden is indeed heavy. "[A] reviewing court must uphold the law if any rational basis conceivably exists for it, regardless of whether Congress had that particular basis in mind when it voted passage." *Eastern Enters*., 110 F.3d at 156 (citation omitted).

> If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in

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[11] The Equal Protection and Due Process clauses of the Fourteenth Amendment enjoin states from causing the deprivation of life, liberty or property without due process of law, nor may states deny to any person "the equal protection of the laws." U.S. Const., Amend. 14 § 1. By its terms, the Fourteenth Amendment does not apply to actions taken by the federal government. However, the Due Process Clause of the Fifth Amendment is applicable to federal action. Further, the "equal protection component" of the Fifth Amendment's Due Process Clause imposes on the federal government the same standard required of states by the Equal Protection Clause of the Fourteenth Amendment. *Schweiker v. Wilson*, 450 U.S. 221, 226 & n.6 (1981). The distinction between equal protection and substantive due process has no great significance here because, "[i]n cases involving rationality review, a court must apply substantially the same analysis to both substantive due process and equal protection challenges." *Eastern Enters. v. Chater*, 110 F.3d 150, 159 (1st Cir.), *cert. granted*, 66 U.S.L.W. 3085 (U.S. Oct. 20, 1997).

> practice it results in some inequality. The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific.

Dandridge, 397 U.S. at 485 (citations and some internal quotation marks omitted); *see also Romer v. Evans*, 116 S.Ct. 1620, 1627 (no equal protection violation if statute "can be said to advance a legitimate governmental interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.") (citations omitted); *Abdulla v. Commissioner of Ins.*, 84 F.3d 18, 20 (1st Cir. 1996) (upholding different auto insurance rates based on territories created by state statute).

I conclude that the plaintiffs have met their burden of demonstrating that the classification at issue is more than a mere rough accommodation of a legitimate governmental end that happens to result in some unfairness to them. During the administrative proceedings, the plaintiffs elicited, via a set of interrogatories posed to the Social Security Administration, the agency's position that Congress opted to "allow offset of either SSI or SSD[] benefits" as a means of "eliminating delay of either payment." Record p. 340. The Commissioner reprises that position here, contending that the challenged practice of first randomly deciding whether to process the SSI or SSD claim first for concurrent claimants and then applying windfall-offset and state reimbursement only to claimants whose SSI claims happen to be processed first is rationally related to the goal of expediting payment of disability benefits to claimants.

This rationale is less than tenuous, even assuming that the Social Security Administration advances the legitimate public purpose of expeditious claims processing to handle concurrent claims by randomly paying SSD or SSI benefits first depending on which claim happens to reach the check-issuing stage first. The system of random processing simply creates two classes of Social Security

beneficiaries: SSD/SSI claimants, whose SSD benefits are processed first, and SSI/SSD claimants, such as the plaintiffs here, who receive their retroactive SSI award first.

The real question is whether the Social Security Administration, having randomly divided its concurrent claimants into two groups, violates the constitutional guarantee of equal protection by then treating these two classes differently in a manner that causes one group to receive significantly less retroactive Social Security disability benefits than the other group. Expeditious claims processing bears no rational relationship to such disparate treatment. The record is devoid of any other objective that is served by such a policy. Indeed, one is hard-pressed to imagine what rationale would justify awarding SSD/SSI claimants more total benefits than SSI/SSD claimants. The distinction bears no more rational relationship to any purpose, much less a legitimate governmental one, than would a policy of awarding more disability benefits to blue-eyed claimants than to brown-eyed ones. *See Romer*, 116 S.Ct. at 1627 (to sustain statute on rational basis grounds, court must be able to "ascertain that there exist[s] some relation between the classification and the purpose it serve[s].")

A fundamental aspect of the rational-relationship test is the principle that when the government classifies it must do so reasonably and not arbitrarily "so that all persons similarly circumstanced [are] treated alike." *Johnson v. Robison*, 415 U.S. 361, 374-75 (1974). Even if it does so randomly — indeed, *especially* because it does so randomly — the Social Security Administration may not divide claimants into two classes and award one group more benefits than the other.

The remaining question is whether the plaintiffs are entitled to the relief they request, which is an order directing the Commissioner to remit to them the SSD benefits they lost through windfall-

offset and reimbursement to the state. I agree with the Commissioner that, in the circumstances of the case, such relief would be inappropriate.

As Justice Harlan has observed,

> [w]here a statute is defective because of underinclusion, there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the state to include those who are aggrieved by exclusion.

Welsh v. United States, 398 U.S. 333, 361 (1970) (Harlan, J., concurring in result). Invoking Justice Harlan's formulation of the principle, the Supreme Court in 1979 extended certain federal welfare benefits to children whose mothers became unemployed because the applicable provision of the Social Security Act provided such benefits to children of unemployed fathers. *Califano v. Westcott*, 443 U.S. 76, 78, 89-90 (1979). The Court cited "equitable considerations" and the fact that "an injunction suspending the program's operation would impose hardship on beneficiaries whom Congress plainly meant to protect." *Id*. at 90.

More analogous to the instant case is *Quiban v. Veterans Admin*., 928 F.2d 1154 (D.C.Cir. 1991). *Quiban* involved a statutory scheme that excluded from federal veterans benefits certain former Philippine soldiers who had been called by President Roosevelt to serve in World War II pursuant to the Philippine Independence Act. *Id*. at 1155. Owing to the arcane history of U.S.-Philippine relations, one group of Philippine World War II veterans nevertheless received full U.S. veterans benefits. *Id*. at 1157. This group, the "Old Philippine Scouts," numbered less than 12,000, in comparison to the between 230,000 and 330,000 other Philippine World War II veterans excluded from benefits. *Id*. at 1163. The District of Columbia Circuit Court of Appeals found no violation of equal protection in such a scheme. *Id*. The court went on to note that, even in the face of a

constitutional infirmity, "serious questions would arise as to the proper remedy." *Id*. This was because, "in choosing between extension and nullification, the reviewing court should defer to the choice that the legislature would likely have made, had it considered the issue itself." *Id*. (citing *Wescott*, 443 U.S. at 90, *id*. at 94 (Powell, J., dissenting), and Justice Harlan's concurrence in *Welsh*, 398 U.S. at 361).

The remedy discussion in *Quiban* is persuasive. As noted by the Third Circuit in *Mazza v. Secretary of Dep't of Health & Human Servs.*, 903 F.2d 953 (3d Cir. 1990), the legislative history of the most recent revision of the windfall-offset provisions unambiguously indicates the intention of Congress to prevent concurrent claimants from receiving both SSD and SSI benefits for the same period of disability and to facilitate the reimbursement of benefits advanced to claimants by states. *Id.* at 956 (citing, *inter alia*, S. Rep. No. 408, 96th Cong., 2d Sess. 78 *reprinted in* 1980 U.S.C.C. A.N. 1277, 1356 ("an individual's entitlement under the two titles shall be considered as a totality."). Nothing would more thoroughly frustrate this intention than to permit concurrent claimants who have received an advance against their Social Security disability benefits from the state both to keep that advance and to receive from the Social Security Administration the entirety of the benefits themselves. Faced with the choice between extending a benefits windfall to SSI/SSD claimants and concluding that neither SSI/SSD nor SSD/SSI claimants ought to receive such a windfall, Congress surely would opt for the latter as a matter of fairness and common sense. As for concurrent claims processed on September 8, 1995 and thereafter, the Social Security Administration has implemented precisely such a policy nationwide.[12] *See* Record p. 65. In my opinion, the Constitution requires

[12] In their reply memorandum, the plaintiffs attack the Commissioner's argument as to the appropriate relief by mischaracterizing it. According to the plaintiffs, the Commissioner's suggested (continued...)

nothing more than that and the court should not award the plaintiffs any additional Social Security benefits.

IV. Conclusion

For the foregoing reasons, I recommend that the decisions of the Commissioner be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 13th day of February, 1998.

David M. Cohen
United States Magistrate Judge

[12](...continued)
remedy involves a court order requiring the Social Security Administration to process SSI payments first in every case involving a concurrent claim — a result, the plaintiffs point out, that would be at variance with the agency's new policy applicable to cases in which there is an attorney fee agreement. In fact, the position of the Commissioner as I understand it does not involve the order in which claims are processed but rather involves calculating benefits in such a manner that the result does not turn on which claim is processed first and permits no claimant to reap a windfall. *See* Record p. 65.